

¹ 5 U.S.C. §§ 8101-8193.

She was first aware of the condition on May 6, 2006 and realized that it was caused or aggravated by her employment on July 22, 2009. OWCP accepted the claim for bilateral carpal tunnel syndrome and paid appropriate benefits. Appellant underwent a left carpal tunnel release on August 6, 2009 and a right carpal tunnel release on September 4, 2012, which OWCP authorized. By decision dated October 26, 2012, OWCP accepted a recurrence on September 4, 2012 due to the authorized surgery.

In a June 13, 2013 report, Dr. Christopher Ferrante, a Board-certified orthopedic surgeon, noted the history of injury, appellant's surgical releases in 2008 and 2012, and that a February 27, 2013 electromyogram (EMG) showed bilateral carpal tunnel syndrome, mild to moderate on her left side, and mild on her right side. He presented examination findings and provided an impression of bilateral hand pain and numbness, left worse than right and bilateral hand carpal tunnel, left worse than right. Dr. Ferrante noted that appellant did not have any improvement in her symptoms following the carpal tunnel release on the left side and requested a magnetic resonance imaging (MRI) scan of the left wrist. In a separate note dated June 13, 2013, he stated that appellant was unable to work, that she needed an MRI scan, and would be out of work until her next appointment. Prescription notes from Dr. Ferrante diagnosed left carpal tunnel syndrome with partial neuropathy and recommended occupational therapy.

In a June 25, 2013 note, Dr. S.A. Bobrow, Ph.D., indicated there was some improvement in appellant's depression.

In a July 5, 2013 report, Dr. Stanley Askin, a Board-certified orthopedic surgeon and OWCP referral physician, noted the history of injury, reviewed the statement of accepted facts, the medical record and set forth examination findings. He opined that the accepted condition of bilateral carpal tunnel syndrome could not, by definition, be present as incising the transverse carpal ligament "decompresses" the median nerve and addresses the carpal tunnel condition. Dr. Askin stated, however, a complication of carpal tunnel release could include damage to the palmar cutaneous branch of the median nerve and, given the nature of appellant's complaints, there was a possibility that the palmar cutaneous nerve may have been troubled by her surgical procedures. He indicated that a simple test could address whether the palmar cutaneous branch of the median nerve (not the carpal tunnel itself) needed additional treatment. Dr. Askin stated that an MRI scan and additional EMG studies were unlikely to be useful in managing her complaints, which may be in the somatic domain or otherwise. He indicated that, since OWCP has accepted appellant as having carpal tunnel syndrome, then she had persisting impairment/disability. Dr. Askin advised that appellant would be able to resume employment either with intervention or after subsidence with time, which was estimated at 6 to 12 months. He stated that appellant had not reached maximum medical improvement but opined that she was capable of working with restrictions of no more than two hours repetitive movements of wrists and no more than four hours with a 10-pound restriction on pushing, pulling, and lifting.

On July 17, 2013 the employing establishment offered appellant a full-time permanent position as a library technician GS-1411-06 with limitations. The duties of the position were modified so that appellant would: lift one book at a time and lift no more than 10 pounds at one time; use a telephone head set to answer telephone calls; limit repetitive wrists movements of typing and use of computer mouse to two hours per day; and stock a bookmobile cart with books one at a time but no push/pull of the cart.

In a July 19, 2013 letter, OWCP advised appellant that the job offer as a library technician was suitable and in accordance with her medical limitations provided by Dr. Askin in his July 5, 2013 report. It also stated that on July 19, 2013 the employing establishment confirmed that this position remained open and available to her. OWCP allowed appellant 30 days to accept the position or provide her reasons for refusal. Appellant was advised that an employee who refuses an offer of suitable work without reasonable cause is not entitled to further compensation for wage loss or schedule award.

In an undated attending physician's report, Dr. Ferrante diagnosed bilateral carpal tunnel syndrome. He indicated that appellant was seen in his office only one time (June 13, 2013) and an MRI scan of the left hand was ordered and she was given an out of work note with no follow-up appointment. No new medical information pertaining to appellant's medical limitations or conditions was received.

On July 23, 2013 appellant stated, on the job offer, that she could not return to work due to orders from Dr. Ferrante, that she has bilateral carpal tunnel, extreme pain in bilateral wrists and could not drive a car due to pain, numbness, and tingling.

In an October 28, 2013 letter, OWCP advised appellant that she had not provided an acceptable reason for not accepting the offered position. Appellant was given an additional 15 days to accept the offered position or she was advised that her benefits would be terminated. The employing establishment verified that the offered position was still available and appellant had not reported to duty. No additional evidence was received from appellant.

By decision dated November 13, 2013, OWCP terminated appellant's entitlement to compensation benefits effective November 17, 2013 on the basis that she refused to accept suitable employment.

On November 18, 2013 appellant, through counsel, requested an oral hearing, which was held by video on April 22, 2014.

Progress notes from Dr. Ferrante were received. In a May 1, 2014 report, Dr. Ferrante stated that he first saw appellant on July 13, 2013 and most recently on May 1, 2014. He advised that she had recurrent or continued carpal tunnel on the left side and recurrent on the right side. Dr. Ferrante advised that an MRI scan was needed to see if anything else was going on, but that was being delayed. He indicated that he would like appellant to see a hand surgeon and advised that she could not work until she saw a hand surgeon. In his May 1, 2014 progress report, Dr. Ferrante provided an impression of recurrent carpal tunnel syndrome worse on left than right and that it was reasonable to keep her out of work until she saw a hand surgeon.

A June 13, 2013 report from Rebecca Zaigler, physician assistant for Dr. Ferrante, was submitted, along with several requests for authorization, physical therapy scripts dated June 5 and 6, 2014, and a June 5, 2014 report from therapist, Lisa Agatone, OTR/L.

In a June 5, 2014 report, Dr. Scott Fried, an osteopath, noted the history of injury and subsequent medical treatment. He presented examination findings and provided an impression of sympathetically mediated pain syndrome, left upper extremity with reactive depression; status post surgery for right median nerve carpal tunnel decompression August 2008 with recurrence

and status post surgery for left median nerve carpal tunnel decompression September 2012 with ongoing symptoms and recurrence; palmar cutaneous neuroma left wrist; carpal tunnel median neuropathy (repetitive strain injury), which he opined were related to her work activities. Dr. Fried recommended custom splints and explained the medical rationale behind the splints. He recommended formal therapy, functional capacity testing, additional diagnostic testing, an appropriate vitamin regimen, therapy and avoiding regular job activities. Dr. Fried stated there was no doubt there was a direct cause and effect relationship between her work activities and the current clinical complaints and physical manifestations of her injuries. He opined that appellant was not capable of performing her work activities and had not been capable of performing her regular work activities since her surgeries which showed ongoing evidence of her bilateral median nerve carpal tunnel involvement. Copies of prescription slips were provided along with an undated note discussing the medical rationale as to why orthopedic neuromusculoskeletal ultrasound was necessary in appellant's case.

By decision dated July 8, 2014, OWCP affirmed the November 13, 2013 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² Section 8106(c)(2) of FECA³ provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.⁴ To justify termination of compensation, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.⁵ Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.⁶

Section 10.517(a) of FECA's implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee has the burden of showing that such refusal or failure to work was reasonable or justified.⁷ Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.⁸

Before compensation can be terminated, however, OWCP has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the

² *Linda D. Guerrero*, 54 ECAB 556 (2003).

³ *Supra* note 1.

⁴ *Id.* at § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

⁵ *Ronald M. Jones*, 52 ECAB 190 (2000).

⁶ *Joan F. Burke*, 54 ECAB 406 (2003).

⁷ 20 C.F.R. § 10.517(a); *see supra* note 5.

⁸ *Id.* at § 10.516.

employee's ability to work, establishing that a position has been offered within the employee's work restrictions and setting forth the specific job requirements of the position.⁹ In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused by appellant was suitable.¹⁰

Once OWCP establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.¹¹ The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.¹² OWCP procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.¹³

ANALYSIS

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome due to her employment. Appellant underwent a left carpal tunnel release on August 6, 2009 and a right carpal release on September 4, 2012, which OWCP authorized.

On July 17, 2013 the employing establishment offered appellant a modified library technician position. The determination of whether an employee has the physical ability to perform a position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.¹⁴ The weight of the evidence in this case clearly establishes that appellant was capable of performing the offered position. Dr. Ferrante, in his June 13, 2013 report, provided an impression of bilateral hand pain and numbness, left worse than right and bilateral hand carpal tunnel, left worse than right. He stated, in a separate note dated June 13, 2013, that appellant was unable to work, that she needed an MRI scan and would be out of work until her next appointment. Subsequent prescription notes from Dr. Ferrante diagnosed left carpal tunnel with partial neuropathy and recommended occupational therapy. He did not indicate a period of disability, nor state that appellant was disabled.

In a July 5, 2013 report, Dr. Askin found that, while appellant had not met maximum medical improvement from her accepted conditions, she was capable of returning to an accommodated job up to eight hours per day, working no more than two hours with repetitive wrist movements and no more than four hours of pushing, pulling, and lifting no more than 10 pounds or in the alternative she would return to unrestricted employment in 6 to 12 months

⁹ See *Linda Hilton*, 52 ECAB 476 (2001).

¹⁰ *Id.*

¹¹ See *supra* note 5.

¹² *Gayle Harris*, 52 ECAB 319 (2001).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work, Job Offer Refusal*, Chapter 2.814.5a (July 2013).

¹⁴ See *Robert Dickinson*, 46 ECAB 1002 (1995).

absent further treatment. The employing establishment's job offer, which required appellant to lift one book at a time with no more than 10 pounds at one time; use a telephone head set to answer telephone calls; do repetitive wrists movements of typing and use of computer mouse no more than two hours per day; and stock bookmobile cart with books one at a time but will not push/pull the cart, is within the restrictions set forth by Dr. Askin for accommodated work. The Board thus finds that the offered position was medically suitable.

The Board further finds that OWCP complied with its procedural requirements in advising appellant that the offered position was suitable, providing her with the opportunity to accept the position or provide reasons for her refusal and notifying her of the penalty provision of section 8106(c).¹⁵

On July 23, 2013 appellant informed OWCP that she could not return to work due to orders from Dr. Ferrante, that she has bilateral carpal tunnel, extreme pain in bilateral wrists and could not drive a car due to pain, numbness, and tingling. She, however, did not submit any medical evidence supporting that she was unable to perform the duties of the offered position. On October 28, 2013 OWCP advised appellant that her reasons for refusing the position were not valid and provided her an additional 15 days to accept the position. The Board finds that it properly followed its procedures in terminating compensation under section 8106.

Subsequent to OWCP's termination of her compensation, appellant submitted a May 1, 2014 report from Dr. Ferrante, who advised that she had either recurrent or continued carpal tunnel on the left side and recurrent on the right side. Dr. Ferrante stated that she could not work until she saw a hand surgeon. In a June 5, 2014 report, Dr. Fried provided an impression of sympathetically mediated pain syndrome, left upper extremity with reactive depression; status post surgery for right median nerve carpal tunnel decompression August 2008 with recurrence and status post surgery for left median nerve carpal tunnel decompression September 2012 with ongoing symptoms and recurrence; palmar cutaneous neuroma left wrist; carpal tunnel median neuropathy (repetitive strain injury), which he opined were related to her work activities. He opined that appellant was not capable of her regular work activities and had not been capable of her regular work activities since her surgeries which showed ongoing evidence for her bilateral median nerve carpal tunnel involvement. Neither physician, however, addressed whether appellant was disabled from the duties of the offered position and, as such, their opinions are of little probative value.

Appellant also submitted several physical therapy reports, a report from a physician assistant and from another therapist. However, such reports do not constitute competent medical opinion as they are not considered a physician as defined under FECA.¹⁶ Thus, these reports along with the copies of prescriptions and requests for authorization are of no probative value in determining whether appellant was disabled from performing the duties of the offered position.

¹⁵ See *Bruce Sanborn*, 49 ECAB 176 (1997).

¹⁶ A.C., Docket No. 08-1453 (issued November 18, 2008). Under FECA, a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2). See also *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

On appeal, counsel contends that the employing establishment contradicted itself by indicating that the library technician job could be performed within the restrictions outlined in Dr. Askin's report. He notes that some of the physical demands of the library technician job would be outside of appellant's restrictions. However, the employing establishment modified the library technician position to include the restrictions pertaining to lifting one book at a time and no more than 10 pounds at one time; use a telephone head set to answer telephone calls; repetitive wrists movements of typing and use of computer mouse no more than two hours per day; and stock bookmobile cart with books one at a time but no pushing/pulling the cart. As these modifications supercede the normal physical demands of the library technician job, counsel's arguments lack merit.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation effective November 17, 2013 on the grounds that she refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the July 8, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 3, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board